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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 BBC CHARTERING & LOGISITIC, GmbH
12 & CO.,

13 Plaintiff,

14 v.

15 VESTAS AMERICAN WIND
16 TECHNOLOGY, INC.

17 Defendant.

CASE NO. C09-5121 RBL

ORDER GRANTING
DEFENDANT'S MOTION TO
DISMISS PURSUANT TO
FORUM SELECTION CLAUSE

18 Before the Court is Defendant's Motion to Dismiss a maritime case about damage to and loss of cargo
19 that was being transported by Plaintiff BBC Chartering & Logistic GmbH & Co. [Dkt. #15]. For the reasons
20 stated below, Defendant's Motion to Dismiss is GRANTED.

21 **FACTS AND PROCEDURE**

22 The facts of this case do not appear to be disputed. On or about November 12, 2007, Defendant
23 Vestas American Wind Technology, the consignee, entered into a contract with Plaintiff BBC Chartering &
24 Logistic GmbH & Co., the carrier, to transport wind turbine towers from Vietnam to Vancouver, Washington.
25 Plaintiff has submitted two Bills of Lading as evidence of the contract of carriage. [Complaint, Ex. 1, Dkt.
26 #1]. Both Bills of Lading contain a choice of law provision and a forum selection clause which provide:
27 "Disputes arising out of or in connection with this Bill of Lading shall be exclusively determined by the
28 courts and in accordance with the law of the place where the Carrier has his principal place of business, as

1 stated on Page 1, except as otherwise provided elsewhere herein.” [Def.’s Mot. Dismiss; Ex. 1 at ¶4, Dkt.
2 # 15]. Page 1 of both Bills of Lading lists the “Carrier’s name/principal place of business” as “BBC
3 Chartering & Logistic CmbH & Co. KG; Hafenstrasse 12; 26789 Leer.” [*Id.*, Ex. 1 at 1]. Leer is located in
4 Germany.

5 On or about November 12, 2007, the cargo was shipped out of Phu My, Vietnam aboard the vessel
6 *Marinus Green*. Some of the cargo was stowed on deck. On or about December 3, 2007, prior to crossing
7 the Columbia River Bar, located off the coast of Washington State, some cargo that was stowed on deck was
8 lost over the side of the vessel. Other cargo on board was damaged.

9 This declaratory judgment action arises from Vestas’ claim for damages resulting from the loss and
10 damage to the on-deck cargo. On March 6, 2009, BBC, ignoring its contractual promise to litigate any
11 “disputes arising . . . exclusively” in the courts of Leer, Germany, filed a Complaint for Declaratory Judgment
12 as to the application of the United States’ Carriage of Goods by Sea Act, 26 U.S.C. §30701 *et seq.* (hereinafter
13 “COGSA”). [Complaint, Dkt. #1]. Plaintiff seeks declaratory judgment as to the following: (1) This Court
14 has personal and subject matter jurisdiction over all of Plaintiff’s claims against Defendant for loss or
15 damages to Cargo; (2) The rights, obligations, and defenses of the parties as to the loss or damage to the
16 Cargo are determined by the terms of the Bills of Ladings and COGSA; (3) Any potential liabilities that
17 Plaintiff may have as to the Cargo is limited to \$500 per package or customary freight unit; and (4) The Court
18 may grant further relief for Plaintiff that the Court deems just and equitable.

19 Defendant moved to dismiss the action on May 14, 2009, pursuant to the forum selection clause in
20 the Bills of Lading. [Mot. Dismiss; Dkt. #14].

21 DISCUSSION

22 **I. The Forum-Selection Clause Is Not Solely For Plaintiff’s Benefit.**

23 The bill of lading is the basic transportation contract between shipper-consignor and the carrier; its
24 terms and conditions bind the shipper and all connecting carriers. *Southern Pacific Transportation Co. v.*
25 *Commercial Metals Co.*, 456 U.S. 336, 343 (1982) (quoting *Texas & Pacific Railroad Co. v.*
26 *Leatherwood*, 250 U.S. 478, 481 (1919)). The purpose of a bill of lading is to effectuate maritime
27 commerce. *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 27 (2004).

28 Plaintiff contends that the forum selection clause is solely for its benefit, and Plaintiff has the right

1 to waive it. A party may unilaterally waive any provision of a contract or statute that is intended for that
2 party's benefit. *Shute v. Thompson*, 82 U.S. 151, 159 (1872). Forum selection clauses, however,
3 generally benefit both parties. In the business of shipping goods across the oceans, ships voyage across
4 the waters of many jurisdictions. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 14 (1972). Much
5 uncertainty and great inconvenience to both parties could arise if a suit could be maintained in any
6 jurisdiction in which an accident might occur or where the barge might be found. *Id.* In pre-selecting a
7 forum, the parties eliminate such uncertainties. *Id.*

8 Choice of forum and law provisions are "often a vital part of shipping agreements." *Carnival*
9 *Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-94 (1991). It would be unrealistic to think that the parties
10 did not conduct their negotiations, including fixing the monetary terms, with the consequences of the
11 forum clause figuring prominently in their calculations. *Id.* "Since uncertainty will almost inevitably
12 exist with respect to any contract . . . with substantial contacts in two or more countries, each with its own
13 substantive laws and conflict-of-law[] rules, a contractual provision specifying in advance the forum for
14 litigating disputes and the law to be applied is an almost indispensable precondition to achieving the
15 orderliness and predictability essential to any international business transaction." *Scherk v.*
16 *Alberto-Culver Co.*, 417 U.S. 506, 506-07 (1974).

17 Such provisions obviate the danger that a contract dispute might be submitted to a forum hostile to
18 the interests of one of the parties or unfamiliar with the problem area involved. *Id.* Additionally, a clause
19 establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion
20 about where suits arising from the contract must be brought and defended, sparing litigants the time and
21 expense of pretrial motions to determine the correct forum and conserving judicial resources that
22 otherwise would be devoted to deciding those motions. *Id.*

23 Sophisticated commercial entities should be able to freely decide by contract the liability regime
24 that is to govern the shipment of goods from a foreign country to their ultimate destination in the United
25 States. *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.*, 557 F.3d 985, 1003 (9th Cir. 2009). In cases
26 involving shipping agreements for the transport of goods across the waters of many jurisdictions, a forum
27 selection clause benefits all contracting parties by eliminating uncertainties and promoting the efficient
28 judicious resolution of disputes. The enforceability of contracts not only promotes confidence to engage

1 in business transactions, but also creates a foundation of trust in an otherwise large and disconnected
2 global community. Allowing Plaintiff to unilaterally waive a forum-selection clause that it chose and
3 contracted for would undermine the business community's trust in the sanctity of the contract.

4 5 **II. The Forum-Selection Clause Is Reasonable and Must Be Upheld.**

6 As the Supreme Court counseled in *Bremen*, "in the light of present-day commercial realities and
7 expanding international trade . . . the forum clause should control absent a strong showing that it should
8 be set aside." 407 U.S. at 15 (1972). Since Plaintiff may not unilaterally waive the forum selection
9 clause, Plaintiff must prove it unreasonable to be unenforceable.

10 A forum selection clause may be unreasonable "(1) if the inclusion of the clause in the agreement
11 was the product of fraud or overreaching; (2) if the party wishing to repudiate the clause would
12 effectively be deprived of his day in court were the clause enforced; [or] (3) if enforcement would
13 contravene a strong public policy of the forum in which suit is brought." *Holland American Line, Inc. v.*
14 *Wartsila North America, Inc.*, 485 F.3d 450, 457 (9th Cir. 2007)(quoting *Murphy v. Schneider National,*
15 *Inc.*, 362 F.3d 1133, 1140 (9th Cir. 2004)). The party resisting enforcement on policy grounds bears a
16 "heavy burden of proof." *Bremen*, 407 U.S. at 17. The critical inquiry to determining whether a clause
17 violates public policy is whether "the choice-of-forum and choice-of-law clauses operated in tandem as a
18 prospective waiver of a party's right to pursue statutory remedies . . ." *Mitsubishi Motors Corp. v. Soler*
19 *Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985).

20 Where both parties are experienced business corporations dealing routinely in international trade
21 and commerce, it cannot be said, and neither party has suggested, that either contracting party was a
22 victim of fraud or overreaching. BBC has not argued, and the Court has no reason to believe, that BBC
23 effectively would be deprived of its day in court if the clause were enforced. Neither party has offered a
24 convincing reason as to why the forum selection clause is unreasonable, and should not be enforced.

25 26 **III. The Forum-Selection Clause Mandates that Disputes Be Exclusively Heard in the Courts of** 27 **Leer, Germany.**

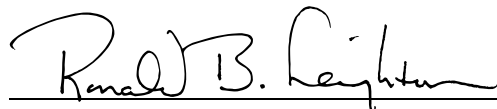
28 Forum selection clauses have been held to require litigation in a particular court when the
language of the clauses clearly require exclusive jurisdiction. *Hunt Wesson Foods, Inc. v. Supreme Oil*

1 Co., 817 F.2d 75, 77 (9th Cir.1987). “A primary rule of interpretation is that ‘[t]he common or normal
2 meaning of language will be given to the words of a contract unless circumstances show that in a
3 particular case a special meaning should be attached to it.’” *Id.*; *See also* 4 S. Williston, A Treatise on the
4 Law of Contracts § 618 (W. Jaeger 3d ed. 1961).” In the contract at issue, the clause states, “Disputes
5 arising out of or in connection with this Bill of Lading shall be *exclusively* determined by the courts and
6 in accordance with the law [of Germany], except as provided elsewhere herein.” [Def.’s Mot.; Ex. 1,
7 Section 4, Dkt. # 15 (emphasis added)]. Nowhere does either Bill of Lading indicate that the forum
8 selection clause is optional. The language is clear. The forum selection clause is mandatory. Any
9 dispute must be litigated exclusively in the courts of Leer, Germany.

10 CONCLUSION

11 Forum selection clauses, in contracts for the shipment of goods across the waters of many
12 different jurisdictions, are for the convenience and benefit of both parties. One party, without the consent
13 of the other party, may not unilaterally waive its terms. The forum selection clause at issue requires
14 adjudication of this dispute in Leer, Germany. Therefore, it is hereby ORDERED that Defendant’s
15 Motion to Dismiss Pursuant to Forum Selection Clause is GRANTED, and this matter is DISMISSED.
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19 DATED this 23rd day of June, 2009.
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24 RONALD B. LEIGHTON
25 UNITED STATES DISTRICT JUDGE
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